18 Cal.App.3d 181

[June CROWNOVER et al., Plaintiffs and Respondents,

v.

James A. MUSICK, etc. et al., Defendants and Appellants.

Civ. 10517.

Court of Appeal, Fourth District, Division 2.

June 18, 1971.

Hearing Granted Aug. 13, 1971.] 181

APPENDIX B-1.

## OPINION

[1184] GARDNER, Presiding Justice.

Following the enactment of Penal Code, sections 318.5 and 318.6,[1] in 1969, the County of Orange enacted Ordinance No. 2356, which states, in pertinent part:

[1185] "Article 1.

"Section 311.011.

"• • • Every person is guilty of a misdemeanor who, while acting as a waiter, waitress or entertainer in an establishment which serves food, beverages, or food and beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such establishment:

"(a) Exposes his or her genitals, pubic hair, buttocks, natal cleft, perineum, anal region or pubic hair region; • • •

"Article 2.

"Section 311.021.

"Every person is guilty of a misdemeanor who, while participating in any live act, demonstration, or exhibition in any public place, place open to the public, or place open to public view:

"(a) Exposes his or her genitals, pubic hair, buttocks, natal cleft, perineum, anal region, or pubic hair region; • •

"Article 3.

"Section 311.031.

"The provisions of Article 1 and Article 2 of this Division shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances. • • •"

Respondents, owners of establishments serving food and alcoholic beverages and employing both nude waitresses and entertainers, filed a complaint for declaratory relief and injunction attacking the constitutionality of the ordinance. The trial [1186] court found the enactment to be unconstitutional and granted a preliminary injunction against its enforcement. The People have appealed.

## THE TEST OF CONSTITUTIONALITY.

In assessing the propriety of the action of the trial court, we bear in mind certain basic principles relative to the judicial review of legislative enactments.

Legislation is presumed to be constitutional. The unconstitutionality of an enactment must be clearly demonstrated, and

1. Penal Code, § 318.5, reads:
"Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a county or city, if such ordinance directly regulates the exposure of the genitals or buttocks of or the breasts of any person who acts as a waiter, waitress, or entertainer, whether or not the owner of the establishment in which the activity is performed employs or pays any compensation to such person to perform such activity, in an establishment which serves food, beverages, or food and beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such establishment.
"The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances.
"This section shall be known and may be cited as the 'Quimby-Walsh Act.'"
Penal Code, § 318.6, reads:
"Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a city or county, if such ordinance relates to any live acts, demonstrations, or exhibitions which occur in public places, places open to the public, or places open to public view and involve the exposure of the private parts or buttocks of any participant or the breasts of any female participant, and if such ordinance prohibits an act or acts which are not expressly authorized or prohibited by this code.
"The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances."

all doubts must be resolved in favor of the statute. (Higgins v. City of Santa Monica, 62 Cal.2d 21, 41 Cal.Rptr. 9, 396 P.2d 41; In re Madera Irrigation District, 92 Cal. 296, 28 P. 272, 675; People ex rel. Mosk v. National Research Co. of Cal., 201 Cal. App.2d 765, 20 Cal.Rptr. 516.) The legislative branch of government is charged with the responsibility of enacting laws to form the framework of a just and orderly society. It is not the function of the judiciary to review the wisdom with which the Legislature acquits itself in this obligation. Only when the law is in clear violation of the Constitution may the courts intervene. The power to declare laws unconstitutional must be used sparingly and with the utmost restraint. Any inclination to extend this prerogative on society as a whole must be firmly rejected. By reason of their protected, cloistered existence, judges are singularly ill-equipped for participation in the law making process. As Justice Frankfurter once said: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." (Mr. Justice Frankfurter concurring in Dennis v. United States, 341 U.S. 494, 525, 71 S.Ct. 857, 875, 95 L.Ed. 1137.)

The Supreme Court of this state has made it clear that constitutionality depends not on the judge's opinions of the wisdom or necessity of the law "• • • but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity?" (Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 522, 20 Cal.Rptr. 638, 642, 370 P.2d 342, 346.)

Bearing these principles in mind, we pass to the merits of this appeal.

## OBSCENITY NOT AN ISSUE.

[1] Initially, we note that appellants do not contend that nudity is obscene per se. Neither is it asserted that there are obscene aspects to the nudity found in respondents' establishments. Neither Penal Code, §§ 318.5 and 318.6, nor Orange County Ordinance No. 2356 seek to proscribe *obscene* activity. The issue before the court is whether the county may broadly prohibit all forms of nudity among the waiters, waitresses and live entertainers in establishments serving food and beverages. Thus, we may resolve this appeal without the necessity of making any further addition to the already bloated body of legal literature in the field of "obscenity."[2]

Appellants' sole assertion in this appeal is that the trial judge committed error in granting the preliminary injunction because County Ordinance No. 2356 violates neither the First Amendment as made applicable to the states by the Fourteenth Amendment, nor the Equal Protection Clause. While the trial judge invalidated the ordinance on the ground that it violated the Equal Protection Clause, we feel constrained to review the First Amendment aspects of this case.

### A.

### *Nudity Per Se.*

[2] Nudity per se is not protected by the First Amendment. It cannot be seriously doubted that the state has a legitimate interest in regulating nudity in certain contexts. In the privacy of the home, nudity may not be a legitimate object of state interest. But on a crowded public street, nudity, albeit, exercised without a

2. Mr. Justice Harlan dissenting in Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 705, fn. 1, 88 S.Ct. 1298, 20 L.Ed.2d 225, noted that in thirteen obscenity cases decided by the United States Supreme Court since *Roth*, there had been *fifty-five* separate opinions among the justices.

scintilla of lewd intent, is a matter of some governmental concern. It may constitute a threat to the maintenance of public peace or, at the very least, a hazard to traffic. Only when nudity becomes part of a method of expression, such as a dance or play, does it come under the protective mantle of the First Amendment. For example, it has been held that dancing is an expression of emotions or ideas and that, therefore, nudity in the dance is entitled to First Amendment protection. (Barrows v. Municipal Court, 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483; In re Giannini, 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535.) Similarly, nudity in the theater has been found to be symbolic speech entailing the communication of ideas and thus entitled to the protection of the First Amendment. (Barrows v. Municipal Court, *supra*.) Thus, while nudity enjoys the protection of free 1188 speech when embodied in some form of expression aimed at the conveyance of ideas, nudity per se is entitled to no such protection. As Justice Douglas stated in his dissent in Roth v. United States, 354 U.S. 476 at 512, 77 S.Ct. 1304 at 1323, 1 L.Ed.2d 1498, "No one would suggest that the First Amendment permits nudity in public places * * *."

The opinions of the Supreme Court of this state in In re Panchot, 70 Cal.2d 105, 73 Cal.Rptr. 689, 448 P.2d 385, and People v. Noroff, 67 Cal.2d 791, 63 Cal.Rptr. 575, 433 P.2d 479, are not to the contrary. These cases merely held that in the absence of sexual activity nudity is not obscene within the meaning of Penal Code, § 311(a), and may not be proscribed as such. The opinions do not discuss the power of the Legislature to regulate nudity in the exercise of its remaining police powers.

B.

*Nude Waiters and Waitresses.*

[3] Part of Article 1, Section 311.011 of Orange County Ordinance No. 2356 bans nude waiters and waitresses in establishments selling food or beverages. We find that in the absence of First Amendment protection the state has the power to regulate the activity of waiters and waitresses performing their duties in the nude. The state's inherent police power enables it to proscribe an activity which possesses an obvious threat to the public peace. Little by way of exposition is needed to point out that naked women in close proximity to the patrons of bars and restaurants present potential problems for the police.

Further, we find that the mantle of the First Amendment does not clothe naked barmaids. Naked waiters and waitresses are entitled to no First Amendment protection on the basis that their nudity is a form of expression of ideas, symbolic expression, or visual communication. Their activity is purely a commercial exhibition. The First Amendment guarantee of free expression is "'* * * to assure unfettered exchange of ideas for the bringing about of political and social changes desired by the people.'" (New York Times Co. v. Sullivan, 376 U.S. 254, 269, 84 S.Ct. 710, 720, 11 L.Ed.2d 686.) The act of being a naked waiter or waitress involves no form of constitutionally protected expression. No constitutionally protected ideas or emotions are conveyed thereby. We cannot label the activities "symbolic speech"; rather, as indicated their nudity is a commercial production used to attract customers. Its elimination will not hinder the operation of the market place of ideas. In City of Portland v. Derrington, 451 P.2d 111, the Supreme Court of Oregon passed on the validity of an ordinance proscribing the exhibition of one or more female breasts in any place where food or alco- 1189
holic beverages were offered to the public for on-premise consumption. The court observed: "When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours."

Obviously, the sight of a naked woman conveys an emotion. This may range from

lust to disgust depending upon the age and proportions of the female and the sex and moral predilections of the viewer. We merely hold that under these circumstances the emotion conveyed is not a constitutionally protected type of visual communication. The naked waitress exists purely for the purpose of increasing liquor sales. She can hardly be held to be a part of an exchange of ideas or the bringing about of political or social change. We cannot in good conscience elevate the act of being a nude waitress to the dignity of a constitutionally protected act.

This portion of Ordinance No. 2356 has no chilling effects on any First Amendment rights of naked waitresses and waiters. Any chill they experience comes from their nudity, not from Ordinance No. 2356.

In concluding this portion of the opinion, we observe that at oral argument respondents advised this court that they were not attacking the constitutionality of the portion of the ordinance concerning waiters and waitresses—but rather only those portions of the ordinance which pertain to live entertainment.

C.

*Nude Entertainers.*

[4, 5] Article 2, section 311.021 of Orange County Ordinance No. 2356 effectively bans live nude entertainment in any public place. A portion of Article 1 of the same ordinance prohibits nude entertainers in establishments serving food and/or drink. As noted, *supra*, the ordinance is not limited to a proscription of obscene entertainment, merely nude entertainment; nor does it attempt to merely regulate the presentation of nude entertainment. It is a ban on nude entertainment en toto, not a limitation as to the time, place or manner of its presentation. However, the Supreme Court has held in the *Barrows* and *Giannini* cases, *supra*, that absent obscenity, nude entertainment is entitled to the protection of the First Amendment as made applicable to the states by the Fourteenth Amendment. Thus, while we do not question that such entertainment is subject to reasonable restrictions as to time, place and manner of its presentation, it may not, under these cases be totally forbidden. Under the rationale of the *Barrows* and *Giannini* opinions, *supra*, Article 2, Section 311.021 of Orange County Ordinance No. 2356 and that portion of Article 1 of the same ordinance which forbids nude live entertainers is overbroad in its application. The chilling effect it may have on the exercise of First Amendment rights as those rights are defined in *Barrows* and *Giannini*, makes it constitutionally defective. Of course, this is not to say that the county cannot establish reasonable regulations as to the time and place of such live entertainment and other restrictions pertaining to health, safety or sanitation. However, constitutionally permissible restrictions on First Amendment rights must be drawn with specificity. (In re Kay, 1 Cal.3d 930, 83 Cal.Rptr. 686, 464 P.2d 142; Castro v. Superior Court, 9 Cal.App.3d 675, 88 Cal.Rptr. 500.) "We are not persuaded by the County's argument that these sections must be viewed 'in context' in order to supply the necessary limitation * * * When restrictions in the area of free expression are at issue, an appeal to 'context' is insufficient to satisfy constitutional requirements of precision." (In re Berry, 68 Cal.2d 137, 155, 65 Cal.Rptr. 273, 285, 436 P.2d 273, 285.)

Thus, under the compulsion of the *Barrows* and *Giannini* decisions, *supra*, we hold the entertainment portions of the subject ordinance to be overbroad, and hence constitutionally impermissible.

EQUAL PROTECTION.

The court below invalidated Ordinance No. 2356 on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment. The trial judge stated that if an affluent person could see a naked woman in a theater by paying $7.00 for a ticket, a poor man should be able to enjoy the same experience in a bar by paying 75¢ for a small glass of beer. As re-

gards nude entertainment, we find the trial judge's exposition of earthy logic persuasive; however, as regards that portion of Article 1, Section 311.011 of the ordinance banning nude waiters and waitresses, we feel the court below was in error.

[6] Respondents attack not only Ordinance No. 2356, but also Penal Code, §§ 318.5 and 318.6, which it is asserted "authorize" the ordinance. Initially, it should be noted that these sections do not "authorize" such an ordinance. They merely permit cities and counties to adopt this type of ordinance free from the restraint of legislative preemption. "They do not authorize the ordinance, for if, as claimed by respondents at the trial level, the state itself could not constitutionally prohibit 'topless' and 'bottomless' in establishments of the type here involved, it cannot authorize its subdivisions to do so." (People v. Lindenbaum, 11 Cal.App.3d supp. 1, 4, 90 Cal.Rptr. 340, 342.) There is no doubt that Penal Code, §§ 318.5 and 318.6, were enacted to indicate that the Legislature had not preempted the field in this area of regulation as had been previously held in In re Lane, 58 Cal.2d 99, 22 Cal.Rptr. 857, 372 P.2d 897. We find no constitutional inhibition against such a declaration.

A.

*Nude Waiters and Waitresses.*

[7] As we have determined above, the protection of the First Amendment does not apply to the purely commercial activities of naked waiters and waitresses.[3]

Thus, Article 1, Section 311.011 of Orange County Ordinance No. 2356, insofar as it bans nude waiters and waitresses amounts in substance to a regulation of purely economic activity. In regard to such regulations, the Supreme Court has said: "* * * we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' Williamson v. Lee Optical Co. of Oklahoma, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563. The rules for testing a discrimination have been summarized as follows:

"'1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369." (Morey v. Dowd, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485.) (See also State of California v. Industrial Accident Comm., 48 Cal.2d 365, 310 P.2d 7; Lelande v. Lowery, 26 Cal.2d 224, 157 P.2d 639.)

Initially, it is not entirely clear as against whom respondents contend they are being denied equal protection. But in any event their argument must fail. If their assertion is that nude waitresses in bars and

3. Now that the Supreme Court has put its stamp of approval on female bartenders (Sail'er Inn, Inc. v. Kirby, 95 Cal. Rptr. 329, 485 P.2d 529, filed 5/27/71), it is obvious that the county is going to have to amend the ordinance to include bartenders. We are not aware of any great ground swell of public demand for naked bartenders but the success of the topless/bottomless bars has been such that it may be reasonably anticipated that if waitresses must partially clothe themselves, there will be a mad rush to be the first to advertise totally nude female bartenders.

restaurants are being discriminated against vis-a-vis nude waitresses in theaters, it is not clear that the latter exist. If their assertion is that nude waitresses, wherever located, are being discriminated against vis-a-vis clothed waitresses, we find that the distinctions between the two types of functionaries justify their differing treatment. As we have already noted, a naked waitress working in a bar or restaurant in close proximity to the predominantly male patronage poses problems to the maintenance of the public peace of a different order than those presented by a clothed waitress. Finally, if respondents' assertion is that nude waitresses are being discriminated against vis-a-vis nude entertainers working in the same establishment, the fact that such entertainers generally perform on a stage or platform geographically removed from the patrons while the waitresses must of necessity mingle therewith provides a sufficient basis to treat the two classes differently.[4]

B.

*Nude Entertainment.*

[8] However, the above analysis is not applicable to respondents' contention in regard to Article 2, Section 311.021, and that portion of Article 1, relative to entertainers. As we have determined above, their activities, so long as they are not obscene, are entitled to the protection of the First Amendment. In the course of his opinion in the case of the United States v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234, wherein it was contended that an article of regulation violated the Due Process Clause of the Fifth Amendment, Mr. Justice Stone stated that "* * * regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." At this juncture, the Justice inserted a footnote, which read, in pertinent part:

"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth * * *

"It is unnecessary to consider now [10] whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation * * *

"Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious * * * or racial minorities * * *; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

The suggestion of Mr. Justice Stone, that the usual presumption of constitutionality of a state statute might be reversed in the case of a statute which on its face infringes on a constitutionally protected right, impedes the free operation of the political process, or works to the detriment of a discrete and insular majority has been adopted by the Supreme Court. As Mr. Justice Douglas stated in Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169: "We have long been mindful that where fundamental rights and liberties are asserted

4. Again, we point out that at oral argument counsel for the respondents advised this court that they were not attacking the constitutionality of this ordinance insofar as it pertains to nude waiters and waitresses.

under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." (See also Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506; Skinner v. State of Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655.)

In the instant case, Article 2, Section 311.021 of Ordinance No. 2356, and that portion of Article 1 pertaining to entertainers, on its face infringes on a constitutionally protected right, that of free speech. Applying the standards enunciated in Harper v. Virginia State Board of Elections, *supra*, 383 U.S. 663, 86 S.Ct. 1079, and Reynolds v. Sims, *supra*, 377 U.S. 533, 84 S.Ct. 1362, we find that the distinction the Ordinance draws between nude entertainment in theaters and that in restaurants and bars is unreasonable. Appellants attempt to justify the distinction on the ground that the entertainers were more remote from their audience in theaters than in bars, and thus less subject to molestation. However, this is not invariably the case; it is not unknown for theater entertainers to leave the stage and mingle with the audience. Further, if the County wishes merely to assure a certain minimum degree of proximity between entertainer and patron in restaurants and bars, it may accomplish this by enacting reasonable regulations directly on that subject.

Appellants further assert that the distinction is justified because the patrons of
194 restaurants and bars have greater access to alcoholic beverages than the theatergoers, which may cause the former group to be prone to committing breaches of the public peace. Again, we note that this is not necessarily the case, as some theaters do make alcoholic beverages available to their patrons. And again, if the County is concerned that the patrons of bars featuring nude entertainment may attempt to commit breaches of the peace vis-a-vis the entertainers, it may enact reasonable regulations restricting the access of those patrons to the entertainers. No meaningful distinction appears between nude entertainment in theaters, on the one hand, and restaurants and bars on the other. Legislation attempting to ban this constitutionally protected activity in one category of facility while not in the other is a denial of equal protection, and, therefore, constitutionally impermissible.

## SEVERABILITY.

[9] The remaining issue is that of severability. Having found that the County's ban on naked waiters and waitresses is valid but that its ban on naked entertainers is constitutionally impermissible,[5] we must determine whether the former may be severed from the latter, leaving the valid portions of the Ordinance enforceable. Constitutional portions of a statute may stand alone and remain in force if they can be separated from the portions which are void. With this Ordinance, we experience no difficulty in severability. Grammatically and conceptually, there is no problem. There is no necessity to read language into the Ordinance to preserve its constitutionality. (In re King, 3 Cal.3d 226, 90 Cal.Rptr. 15, 474 P.2d 983.) Here, there is no general language which simultaneously sweeps up constitutionally protected and unprotected conduct in an indissoluble prohibition. (In re Hoffman, 67 Cal.2d 845, 64 Cal.Rptr. 97, 434 P.2d 353; In re Blaney, 30 Cal.2d 643, 184 P.2d 892.) The valid portions of this Ordinance concerning waiters and waitresses are mechanically and grammatically severable from those portions concerning entertainers and entertainment. The provisions concerning waiters and waitresses are valid, enforceable and severable from those invalid provisions concerning entertainers.

5. An interesting factual situation will present itself when an ingenious bar owner advertises naked singing waitresses.

SUMMARY.

In summary, we hold that those sections of Article 1, Section 311.011 of Orange County Ordinance No. 2356 pertaining to nude waiters or waitresses neither inhibit the exercise of respondents' rights under
[198] the First and Fourteenth Amendments, nor deny them equal protection of the law. Thus, the trial court was in error in granting an injunction forbidding enforcement of that portion of the Ordinance. However, Article 2, Section 311.021 of that Ordinance and that portion of Article 1 pertaining to entertainers do violate respondents' freedom of speech as interpreted by the *Barrows* and *Giannini* opinions, *supra*, and guaranteed by the First and Fourteenth Amendments and are also violative of the Equal Protection Clause. Thus, as regards this portion of the enactment the trial court was correct in granting respondents' request for injunctive relief.

Order affirmed in part and reversed in part.